

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2648

Cir. Ct. No. 2010CF44

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH MKK ENRIQUE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Affirmed.*

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ

¶1 PER CURIAM. Joseph Enrique appeals an order denying his WIS. STAT. § 974.06 (2011-12)¹ motion to withdraw his no contest plea to battery to a

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

law enforcement officer. Enrique argues that his trial counsel was ineffective regarding Enrique's initial plea of not guilty by reason of mental disease or defect (NGI) and his withdrawal of that plea, regarding the use at sentencing of the psychological report prepared after Enrique entered the NGI plea, and regarding whether Enrique understood the intent element. We reject those arguments and affirm the order.

¶2 The 2010 complaint charged Enrique with battery to a law enforcement officer, retail theft, and obstructing an officer. Enrique's trial counsel, believing that Enrique might have been traumatized by an earlier incident in which a private organization hired by his parents apprehended him, entered an NGI plea and requested a psychological evaluation. At the suggestion of defense counsel, the court appointed Dr. James Freiburger to examine Enrique. Freiburger concluded that Enrique did not suffer from a mental disorder and was able to control his conduct and appreciate the wrongfulness of his acts, and Enrique's parents did not retain another expert to refute Freiburger's findings. Enrique's counsel subsequently withdrew the NGI plea.

¶3 Pursuant to a plea agreement, Enrique pled no contest to battery to a law enforcement officer and the other charges were dismissed and read in for sentencing purposes. The parties jointly recommended two years probation. The State recommended jail time as a condition of probation, and the defense argued for no jail time. The court imposed three years' probation with no jail time.

¶4 In September 2013, Enrique moved to modify his sentence, conduct a new sentencing hearing, or withdraw his no contest plea. After conducting a hearing regarding effective assistance of counsel, the court denied the motions.

On appeal, Enrique challenges the portion of the order denying his motion to withdraw his no contest plea based on ineffective assistance of counsel.

¶5 To establish ineffective assistance of counsel, a defendant must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court does not need to address both the deficient performance and prejudice components if the defendant does not make a sufficient showing on one. *Id.* at 697. In the context of a no contest plea, the defendant must show that, but for counsel's alleged deficiencies, he would not have pled no contest and would have instead proceeded to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

¶6 Enrique faults his trial counsel for abandoning the NGI plea without first discussing the matter with Enrique, instead communicating with Enrique's mother about the possibility of procuring another psychological report. However, Enrique's motion does not allege and, in his postconviction testimony, Enrique does not say, that he would not have withdrawn the NGI plea had counsel consulted with him prior to the day of the plea hearing. Enrique argues that he would have sought a second evaluation. However, his brief does not explain what the evaluation would have reported and nothing in the record suggests that any report would have supported the NGI plea. Therefore, Enrique has not established prejudice from his counsel's failure to consult with him on that issue.

¶7 Enrique also faults his counsel for failing to inform him about the purposes and uses of the psychological examination, failing to inform him that agreeing to the examination would waive his Fifth and Sixth Amendment rights, and failing to tell him the report could be used at the sentencing hearing. Again, Enrique fails to establish prejudice because his motion did not allege and he did

not testify that he would not have entered the no contest plea had he been provided with that information.

¶8 Enrique faults his trial counsel for failing to object when Freiburger's report was used at the sentencing hearing "in a way not contemplated by the statute." Enrique contends that the court relied on Freiburger's report in imposing a sentence more harsh than the joint recommendation. Enrique's counsel had no valid basis for challenging the sentencing court's use of the psychological report at the sentencing hearing. The sentencing court is permitted to consider all information that reasonably might bear on the proper sentence. *Wasman v. United States*, 468 U.S. 559, 563 (1984); *State v. Guzman*, 166 Wis. 2d 577, 591, 480 N.W.2d 446 (1992). Furthermore, the record does not support Enrique's contention that he was prejudiced by the court's consideration of Freiburger's report. The circuit court cited Freiburger's report as a reason the court rejected a jail term as a condition of probation.

¶9 Finally, Enrique faults his trial counsel for failing to adequately explain the intent element. However, at the plea hearing, after conferring with his attorney, Enrique confirmed that he understood the four elements that were listed on an attachment to the Plea Questionnaire/Waiver of Rights form. In addition, both counsel and Enrique testified at the postconviction hearing that they did not recall counsel explaining the elements to Enrique. Lack of recall is not a denial. Enrique did not testify that counsel failed to explain the intent element. Furthermore, Enrique's postconviction motion does not allege, and his postconviction testimony does not establish, that he would not have entered the no contest plea if he had been provided with some additional information regarding the intent element.

¶10 Accordingly, we conclude that the circuit court did not err in denying the motion to withdraw the no contest plea.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

